

BEFORE THE PUBLIC DISCLOSURE COMMISSION
OF THE STATE OF WASHINGTON

IN RE COMPLIANCE)	PDC CASE NOS: 04-663
WITH RCW 42.17)	04-664
)	
Ed Herbert and Dennis Nusbaum)	REPORT OF INVESTIGATION
(Ballard High School, Seattle School District))	
Respondents.)	
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I.

BACKGROUND

- 1.1 On June 3, 2004, the Public Disclosure Commission received a complaint filed by Jami Lund with the Evergreen Freedom Foundation against Ed Herbert and Dennis Nusbaum, employees of Ballard High School in Seattle School District No. 1, alleging a violation of RCW 42.17.130. Mr. Lund alleges that Mr. Herbert and Mr. Nusbaum used the school district's internal mail system and e-mail to support a statewide referendum, Referendum 55, and a statewide ballot initiative, I-884.
- 1.2 On June 24, 2004, Referendum 55 qualified for the November 2004 ballot. Sponsors of the referendum submitted 153,718 petition signatures to the Secretary of State, of which 135,745 were valid signatures – 36,878 more than the required minimum. Referendum 55 will ask the voters to either approve or reject Engrossed Second Substitute House Bill 2295. Charter schools legislation was slated to go into effect on June 10, 2004. It is now suspended until the results of the November general election are certified on December 2, 2004.
- ESSHB 2295 would authorize the establishment of a limited number of charter public schools operated according to the terms of their charters. A charter would be a five-year contract negotiated between an eligible nonprofit corporation and a local education board. Charter schools would be subject to certain state laws relating to public schools, and exempt from others.
- 1.3 On August 2, 2004, Initiative I-884 qualified for the November 2004 ballot. The official ballot summary on Initiative 884 reads, "This measure would create a fund designated for preschool through college education by increasing the retail sales tax

rate by 1%. The fund would support preschool assistance for low-income children; additional K-12 programs selected by school districts with citizen input; additional higher education enrollments, scholarships and research; and salary increases for certain teachers and other employees of the school districts and community and technical college districts. A citizen oversight board is established and audits performed.”

- 1.4 On September 29, 2000, the Public Disclosure Commission (Commission) released their interpretation and the Guidelines for Local Government Agencies, including School Districts in Election Campaigns. In a question/answer section concerning whether a union representing public employees may distribute materials supporting or opposing a ballot measure on the local agency property, the Commission stated that the distribution of campaign materials by union representatives to their members must be limited to the agency lunchroom or break room which is dedicated to staff and not accessible to the general public. The Commission has said that the internal mail system of an agency is a public facility. In PDC Declaratory Ruling No. 4 (May 27, 1980), the Commission reaffirmed a decision it made in an enforcement setting that the use of a local agency’s internal mailing systems for candidate endorsements would violate RCW 42.17.130. The same conclusion applies to using an agency’s internal mail system to distribute materials supporting or opposing a ballot measure.

II. SCOPE

- 2.1 Staff reviewed the complaint letter received June 3, 2004, with an attached e-mail from Mr. Nusbaum entitled, “FW: R- 55 petitions,” and an attached e-mail from Mr. Herbert entitled, “FW: June 2 pick up of Petitions (sic).”
- 2.2 Staff reviewed the letter received on June 28, 2004 from Dennis Nusbaum.
- 2.3 Staff members of the PDC conducted separate interviews under oath with Dennis Nusbaum and Ed Herbert on July 28, 2004, conducted via teleconference from the office of the Public Disclosure Commission in Olympia, Washington. Harriet Strasberg, attorney at law for the Washington Education Association, represented Mr. Nusbaum and Mr. Herbert. (Hereafter, the interview under oath with Mr. Nusbaum will be referred to as NIO, and the interview under oath with Mr. Herbert will be referred to as HIO.)
- 2.4 Staff members of the PDC conducted an interview under oath with Charles Chinn, interim principal of Ballard High School, on August 25, 2004, conducted via teleconference from the office of the Public Disclosure Commission in Olympia, Washington. John Cerqui, attorney at law for the Seattle School District represented Mr. Chinn. (Hereafter, the interview under oath with Mr. Chinn will be referred to as CIO.)

- 2.5 Staff reviewed the Declaration of Charles Chinn with attached network use agreement submitted August 30, 2004.
- 2.6 Staff reviewed the pages of the Seattle Education Association collective bargaining agreement with Seattle School District submitted August 27, 2004.
- 2.7 Staff reviewed the memo distributed by Charles Chinn to Ballard High School staff concerning Referendum 55.

III.
LAW

3.1 **RCW 42.17.130** states in part:

No elective official nor any employee of his office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition. Facilities of public office or agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of employees of the office or agency during working hours, vehicles, office space, publications of the office or agency, and clientele lists of persons served by the office or agency: PROVIDED, That the foregoing provisions of this section shall not apply to the following activities:

- (1) Action taken at an open public meeting by members of an elected legislative body to express a collective decision, or to actually vote upon a motion, proposal, resolution, order, or ordinance, or to support or oppose a ballot proposition so long as (a) any required notice of the meeting includes the title and number of the ballot proposition, and (b) members of the legislative body or members of the public are afforded an approximately equal opportunity for the expression of an opposing view;
- (2) A statement by an elected official in support of or in opposition to any ballot proposition at an open press conference or in response to a specific inquiry;
- (3) Activities which are part of the normal and regular conduct of the office or agency.

3.2 **WAC 390-05-273** states the following:

Normal and regular conduct of a public office or agency, as that term is used in the proviso to RCW 42.17.130, means conduct which is (1) lawful, i.e., specifically authorized, either expressly or by necessary implication, in an appropriate enactment, and (2) usual, i.e., not effected or authorized in or by some extraordinary means or manner. No local office or agency may authorize a use of public facilities for the purpose of assisting a candidate's campaign or promoting or opposing a ballot

proposition, in the absence of a constitutional, charter, or statutory provision separately authorizing such use.

3.3 Declaratory Ruling No. 4 (May 27, 1980) states in part:

Distribution through the internal mail system of a school district of a newsletter published by a local education association, which contains endorsements of candidates for public office, would violate RCW 42.17.130.

3.4 Declaratory Ruling No. 10 (November 16, 1993) states in part:

Unless express authority is granted by an independent source, a local agency cannot promote a ballot proposition as "normal and regular conduct" of the agency, for to do so would be in violation of RCW 42.17.130.

IV.
FINDINGS

4.1 On June 3, 2004, the Public Disclosure Commission received a complaint filed by Jami Lund of the Evergreen Freedom Foundation against Ed Herbert and Dennis Nusbaum, employees of Ballard High School in the Seattle School District No. 1, and building representatives for the Seattle Education Association (SEA), alleging a violation of RCW 42.17.130. Mr. Lund alleges that Mr. Herbert and Mr. Nusbaum used the school district's internal mail system and e-mail to support a statewide referendum, Referendum 55, and a statewide ballot initiative, I-884. **(Exhibit 1)** Mr. Lund included with his complaint an e-mail from Mr. Nusbaum entitled, "***FW: R- 55 petitions,***" and an e-mail from Mr. Herbert entitled, "***FW: June 2 pick up of petitions***" that reference activities taken with regard to Referendum 55 and Initiative 884, as evidence of his allegations.

Dennis Nusbaum's activities supporting ballot issues:

4.2 During the 2003 – 2004 school year, Dennis Nusbaum was a special education teacher at Ballard High School. He has been a teacher in the Seattle School District for 18 years, and has taught the last four years at Ballard High School. In addition, he has been a Seattle Education Association building representative for his school for the past year. **(Exhibit 2)** Mr. Nusbaum stated under oath that until the complaint was filed against him, he was not aware of the prohibition on using public facilities in election campaigns. He stated, "***I wasn't particularly aware of that prior to these events.***" **(Exhibit 3, NIO p. 2)**

4.3 Mr. Nusbaum stated he and Ed Herbert were the building representatives at Ballard High School during the 2003 – 2004 school year. He stated, "***the only active building reps that we had at Ballard at this time were Ed and myself.***" **(Exhibit 3, NIO p. 14)**

4.4 On May 12, 2004, at 10:50 a.m., Mr. Nusbaum sent an e-mail entitled, ***"FW: R- 55 petitions,"*** from his Ballard High School e-mail account and school PC to ***"!Ballard Allstaff,"*** an internal e-mail address for Ballard High School's 141 employees. **(Exhibit 1, 2, and 3)** The staff's e-mail addresses are also available on the school's Website, at the following link:
http://ballard.seattleschools.org/academics/fac_Email.html.

4.5 Mr. Nusbaum's e-mail stated the following:
"Colleagues, please return completed petitions by noon tomorrow. The remaining incomplete or yet to be completed petitions will be collected 5/24/04. Thanks...Dennis" (Exhibit 1)

4.6 Mr. Nusbaum's May 12th e-mail included a forwarded e-mail from Maggie Crain, an Associate Executive Director of the Seattle Education Association (SEA). **(Exhibit 1)** Ms. Crain's e-mail was sent Wednesday, May 12, 2004 at 9:34 a.m., and was addressed to the 'Building Representatives.' **(Exhibit 1)** Ms. Crain wrote that she, Ben Ibale, a SEA staffer, John Dunn, SEA president, and George Hoyt, Substitute Department Vice Chair, would be coming to the e-mail recipient's school the next day to pick up completed Referendum 55 petitions, on Thursday, May 13, 2004. Ms. Crain requested that the building representatives leave the signed petitions ***"in an identifiable packet at the front desk,"*** to facilitate pick up, which would begin at 9:00 a.m. the next day. **(Exhibit 1)**

In addition, Ms. Crain's e-mail, forwarded by Mr. Nusbaum, stated the following:
"It's important that we collect all the signatures your staff currently has so we can do what Ben calls a "temperature check." It will give us a gauge to know as to how hard we have to work to reach our goal of 10,000 signatures by June 4." (Exhibit 1)

4.7 In a letter responding to the complaint, Mr. Nusbaum states that he believes that the content of his e-mail is ***"informational and very neutral,"*** and that he ***"did not intend his e-mail to support the referendum or to encourage people to support the referendum. I was merely forwarding an e-mail that I received from Seattle Education Association in an attempt to fulfill my obligation as building representative for SEA by informing of the timeline for petition collection."*** **(Exhibit 2)**

4.8 Mr. Nusbaum stated under oath that he sent the May 12th e-mail to all staff to fulfill his responsibilities as building representative to communicate with union members. He stated, ***"I sent it to all of the staff because I was fulfilling my responsibilities as a building rep to communicate this information to the staff. And I didn't have a separate address book for just SEA members. So I sent it to the entire staff which included administration as well and custodians and whoever else I suppose...."*** **(Exhibit 3, NIO p. 5)** Mr. Nusbaum further stated, ***"... the union in order to be able***

to function within the district has to be able to communicate with its members. And I just thought that, you know, this was just a natural part of that relationship...and that this was just informational.” (Exhibit 3, NIO p. 10)

4.9 Mr. Nusbaum stated that he did not routinely forward messages from the SEA when he e-mailed union members, but that he forwarded Ms. Crain’s e-mail due to the ballot issue. **(Exhibit 3)** He stated, ***“Well ... in my tenure as a building rep this is the first time that we had something like this going on. You know, where we had an initiative or a petition...It seemed as though the only way that we were going to be able to reach this 130 people. To me.” (Exhibit 3, NIO p. 5 and 6)*** Mr. Nusbaum stated that he forwarded the SEA e-mail of his own accord, and not at anyone’s suggestion. **(Exhibit 3, NIO p. 6)**

4.10 In addition to sending the May 12th e-mail, Mr. Nusbaum stated under oath that he personally handed out blank petitions to approximately half of Ballard High School’s teachers, which he estimated to be about 60 to 70 people. **(Exhibit 3, NIO p. 7)** Mr. Nusbaum stated, ***“People had to come to either me or one of the other building reps and sign for a petition. Or initial for a petition...Yes. I distributed them and they were usually distributed after school or before school. Some of them might have been distributed during my planning time...” (Exhibit 3, NIO p. 6)*** When asked to quantify the number he delivered, Mr. Nusbaum stated, ***“I don’t know. Half of what were distributed maybe. Just a guess. I mean there were two of us distributing them.” (Exhibit 3, NIO p. 7)***

4.11 Mr. Nusbaum stated that he received the petitions to distribute at his school at a meeting of Seattle Education Association building representatives. He stated that no one from the union ever suggested that he distribute or collect the petitions using the mailboxes. Mr. Nusbaum stated that he and Ed Herbert initiated use of the mailboxes as an efficient way to collect petitions. **(Exhibit 3, NIO p. 13 and 14)**

4.12 Mr. Nusbaum received completed petitions that were hand delivered to him, and that were placed at his desk, and in his mailbox. **(Exhibit 3, NIO p. 8)** Mr. Nusbaum was not able to quantify how many petitions he collected. He stated, ***“The fact that it was a sign out, ... I think, was to make it more apparent who wasn’t returning them. I guess that was intended to make it more effective in collecting them. So I would imagine that the majority of them were collected.” (Exhibit 3, NIO p. 11)***

4.13 After receiving the petitions, Mr. Nusbaum stated that he did not recollect how the petitions were returned to the association, but that either he or Ed Herbert returned the petitions to the SEA. **(Exhibit 3, NIO p. 12)** He stated, ***“I may have given them to Ed. But I’m not sure.” (Exhibit 3, NIO p. 11)*** Mr. Nusbaum stated that although he did not place petitions in a packet at the front desk for pick up, he believed that this step may have occurred. **(Exhibit 3, NIO p. 8)** Mr. Nusbaum

stated, ***“I believe it probably did. But I’m not sure. It probably did. I didn’t do it though.”*** (Exhibit 3, NIO p. 8)

- 4.14 Mr. Nusbaum stated that as a result of the complaint being filed, his principal, Charles Chin, informed him that his activities were a problem. Mr. Nusbaum stated, ***“...he (Mr. Chin) handed me this letter and he told me that, basically that I’m in trouble with this particular agency and, you know I guess he pretty much told me that, you know, that I shouldn’t be doing whatever it is that I had done ...”*** (Exhibit 3, NIO p. 9)

Ed Herbert’s activities supporting ballot issues:

- 4.15 During the 2003 – 2004 school year, Ed Herbert was a special education teacher at Ballard High School. He has been a teacher for 16 years, and has taught the last five years at Ballard High School. In addition, he has been a Seattle Education Association building representative for his school for the past three years. **(Exhibit 4, HIO p. 2)** Mr. Herbert stated under oath that he was aware of the prohibition on using public facilities, including the e-mail system, but did not recall if he was aware of the prohibition prior to the complaint against him was filed. **(Exhibit 4, HIO p. 4)**

- 4.16 On June 2, 2004, at 7:21 a.m., Mr. Herbert sent an e-mail entitled, ***“FW: June 2 pick up of Petitions”*** from his Ballard High School e-mail account and school PC to ***“!Ballard Allstaff,”*** an internal e-mail address for Ballard High School’s 141 employees. **(Exhibit 4, HIO p. 5)** The staff’s e-mail addresses are also available on the school’s Website, at the following link:
http://ballard.seattleschools.org/academics/fac_Email.html.

- 4.17 Mr. Herbert’s e-mail stated the following:
“Anyone who still has a petition for Referendum 55 or I – 884...Please put them in Dennis Nusbaum or my mailbox. They will be picked up by SEA folks today. Thanks!” (Exhibit 1)

- 4.18 Mr. Herbert’s June 2nd e-mail included a portion of a forwarded e-mail from Maggie Crain, an Associate Executive Director of the Seattle Education Association (SEA). **(Exhibit 1)** The addressing section of Ms. Crain’s e-mail was not included in Mr. Herbert’s e-mail, but the following message appeared, with Ms. Crain’s signature contact information:

“A team of SEA folks will be coming by schools on Wednesday, June 2 to pick up signed petitions. Please pull them together and have them ready at the front desk. Thanks!!”

***--Maggie Crain
Associate Executive Director
Seattle Education Association
720 Nob Hill North***

Seattle, WA 98109
206.283.8443 x204
mcrain@washingtonea.org

- 4.19 Mr. Nusbaum stated that he thought Mr. Herbert suggested in his e-mail that people use the mailboxes, including Mr. Nusbaum's mailbox, to collect petitions as ***"an efficient and non disruptive manner in which to collect these things."*** (Exhibit 3, NIO p. 11) Mr. Nusbaum acknowledged that he and Mr. Herbert ***"might have discussed a strategy for collecting"*** the petitions prior to the e-mail being sent that mentioned placing petitions in his mailbox, but that he could not recall. (Exhibit 3, NIO p.11)
- 4.20 Mr. Herbert stated that he sent the June 2nd e-mail to notify people to return petitions for collection, and that he was not directed by anyone to forward Ms. Crain's e-mail. (Exhibit 4, HIO p. 5) He stated, ***"...it was my desire to have folks who had, by their own choice, got petitions to have them understand that they were going to be picked up later that day."*** (Exhibit 4, HIO p. 5)
- 4.21 Mr. Herbert stated under oath that Referendum 55 and Initiative 884 petitions were delivered to Ballard High School teachers through the mailboxes. (Exhibit 4, HIO p. 6 and 8) He stated, ***"We put them in each teacher's mailbox... gave them out to staff members by putting them in the mailbox. It just seemed, my feeling was it was the most expedient way to do this."*** (Exhibit 4, HIO p. 6) Mr. Herbert stated that petitions were not delivered during the school day. He stated, ***"We would give them out after school or before school. We would put them in boxes after school or before school."*** (Exhibit 4, HIO p. 10)
- 4.22 Mr. Herbert stated that no one directed him to use the mailboxes, and that he did not recall specifically if he placed petitions in mailboxes. (Exhibit 4, HIO p. 6) He stated, ***"I don't recall. But in general one person will do it or one assistant or one other building rep will do it. I don't know though. I can't recall how. I know that one was likely put in each person's box but I don't know the specifics of this situation."*** (Exhibit 4, HIO p. 7)
- 4.23 Mr. Herbert stated that he could not recall how petitions were picked up by SEA representatives in his school, and whether a packet of petitions were placed at the front desk. He stated, ***"I can't recall exactly what happened, but the email indicated from SEA folks, that they were coming to get them and rather than have them try to find us, we were just looking for a way that they could come into the building and pick them up and leave, to you know, maximize everyone's time. So they were either left in Dennis or my mailbox or, I don't know. Yeah. I don't know exactly. But I know they came and picked them up and they were likely in one of our boxes."*** (Exhibit 4, HIO p. 8)

4.24 Mr. Herbert stated that as a result of the complaint being filed, his principal, Charles Chin, told him that using the email in this fashion, and using the mailboxes in this fashion needed to stop. Mr. Herbert stated, ***“He (Charles Chinn) called me down to his office and showed me the complaint and said that someone had, someone was upset that they felt that something improper had happened and that from then on we should make sure not to do that ... And he sent out an email to the staff in that, discussing that.”*** (Exhibit 4, HIO p. 9 and 11)

Activities of Charles Chinn, Ballard High School Interim Principal:

4.25 During the later portion of the 2004 school year, Charles Chinn was Ballard High School’s Interim Principal. Previously, he has completed ten years as a principal at Ballard High School. (Exhibit 5, CIO p. 2) Mr. Chinn stated under oath that he is aware of the prohibition on using public facilities in election campaigns, most recently due to a reminder from the legal counsel’s office for the district in January 2004. He stated, ***“Most recent notification came out two days after I was appointed to the interim position at Ballard High School.”*** (Exhibit 5, CIO p. 3)

4.26 Mr. Chinn stated that although he received the May 12th and June 2nd e-mails from Mr. Nusbaum and Mr. Herbert, he did not read them due to the number of general all-staff e-mails he receives daily. Further, Mr. Chinn stated that he was aware that Mr. Herbert was a SEA building representative, and believed Mr. Herbert’s e-mail was association communication with its members. (Exhibit 5) He stated, ***“Yes. There are quite a few mail, the mail that I get are entitled all staff that I just glance over or don’t bother to read to be quite honest with you.”*** (Exhibit 5, CIO p. 12)

4.27 Mr. Chinn stated that after receiving notification by the Seattle Public School’s attorney, John Cerqui, of a complaint being filed against Mr. Herbert and Mr. Nusbaum, he spoke to his employees. Mr. Chinn stated that he did not speak to his employees concerning use of the mailboxes to distribute petitions due to an oversight, however, Mr. Chinn stated that he told Mr. Herbert and Mr. Nusbaum to stop using the e-mail concerning the ballot issues. (Exhibit 5, CIO p. 9) Concerning Mr. Herbert, Mr. Chinn stated, ***“we spoke about the emails and advised him not to use the email.”*** (Exhibit 5, CIO p. 9) Concerning Mr. Nusbaum, Mr. Chinn stated, ***“I told him that there was this concern and I asked him to read the Guidelines as relayed to me by Mr. Cerqui and that there was potential that he would be in violation of the law...I advised him not to use the email in that fashion, yes.”*** (Exhibit 5, CIO p.7)

4.28 Mr. Chinn stated that in June of 2004, after he learned of the complaint with the PDC, he distributed a PDC memorandum concerning Referendum 55 petitions to his employees, along with a statement he wrote in the upper right hand corner of the document. (Exhibit 5, CIO p. 4 and Exhibit 6) He stated, ***“I did distribute the Public Disclosure Commission memorandum to all staff with this statement, “per***

the attached bulletin staff members are reminded not to use district email and equipment including mailboxes to support or oppose Referendums or ballot measures.” (Exhibit 5, CIO p. 10)

4.29 The collective bargaining agreement between the Seattle Education Association and the Seattle School District states the following concerning membership communication: ***“The District and the Association agree that having the Association included in the District’s E-mail program is an important element of building quality communications. The Association will take the necessary steps to ensure that all communications are accurate and in line with its duties as bargaining representative.” (Exhibit 7)***

4.30 The Seattle School District network use agreement states the following concerning the prohibition on using public facilities in election campaigns: ***“The following conduct is prohibited on the District network:...Supporting or opposing a political candidate, an election campaign, or a ballot proposition, including a school levy...” (Exhibit 8)***

4.31 PDC Staff completed the report of investigation on August 31, 2004 and made minor editing changes on October 6, 2004.

Respectfully submitted this 6th day of October 2004.

Suemary Trobaugh
Senior Political Finance Specialist

EXHIBITS LIST

- Exhibit 1** Letter of complaint received June 3, 2004, from Jami Lund, with an attached e-mail from Mr. Nusbaum entitled, “FW: R- 55 petitions,” and an attached e-mail from Mr. Herbert entitled, “FW: June 2 pick up of Petitions (sic).”
- Exhibit 2** Letter of response received on June 28, 2004 from Dennis Nusbaum.

- Exhibit 3** Transcripts of interviews under oath with Dennis Nusbaum on July 28, 2004.
- Exhibit 4** Transcripts of interviews under oath with Ed Herbert on July 28, 2004.
- Exhibit 5** Transcripts of interviews under oath with Charles Chinn, interim principal of Ballard High School, on August 25, 2004.
- Exhibit 6** May 18, 2004 memorandum from the PDC to school superintendents with note from Charles Chinn.
- Exhibit 7** Portion of collective bargaining agreement between the Seattle Education Association and the Seattle School District.
- Exhibit 8** Declaration of Charles Chin with attached network use agreement submitted August 30, 2004.